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No. 08-822

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IN THE

Supreme Court of the United States

SCOTT A. MCLAUGHLIN,
Petitioner,

v.

STATE OF MISSOURI,
Respondent.

On Petition For a Writ of Certiorari
To the Supreme Court of Missouri
– Capital Case –

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

In Missouri, in capital cases, after the jury finds a defendant guilty of murder in the first degree, the jury must then determine, in a separate penalty-phase proceeding, whether a sentence of death should be imposed. In the penalty phase, if the jury finds a statutory aggravating circumstance beyond a reasonable doubt, the defendant is eligible to receive a sentence of death. Thereafter, if the jury concludes either (1) that the evidence in mitigation outweighs the evidence in aggravation, or (2) that under all of the facts and circumstances that a sentence of death is not warranted, the jury will impose a life sentence. The manner in which the first of these enumerated steps (the "weighing" step) is carried out gives rise to some potential questions, including:

I. Under the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) – where the Court affirmed that "any fact . . . that increases the maximum penalty for a crime must be . . . submitted to a jury, and proven beyond a reasonable doubt" – does a jury in Missouri have to make its weighing determination beyond a reasonable doubt; and

II. Does requiring the defendant to prove the greater weight of the mitigating evidence violate the Eighth and Fourteenth Amendments.

PARTIES TO THE PROCEEDING

The petitioner, Scott A. McLaughlin, was the appellant below. The State of Missouri was the respondent.

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OPINIONS BELOW

The opinion of the Missouri Supreme Court is reported at 265 S.W.3d 257 (Mo. banc 2008), and it is included in the Appendix to the petition at 1a-42a.

JURISDICTION

The Missouri Supreme Court entered judgment on August 26, 2008. The Court denied rehearing on September 30, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). But because the Missouri Supreme Court did not decide (and was not asked to decide) the federal questions presented by the petition, the Court lacks jurisdiction to grant a writ of certiorari on those federal questions.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . .

Constitution of the United States, Amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Constitution of the United States, Amendment XIV, Section 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the

> state wherein they reside. No state shall . . . deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1257(a):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

MISSOURI REVISED STATUTES, § 565.030.4 (2008), in relevant part:

> If the trier at the first stage of a trial where the death penalty was not waived finds the defendant guilty of murder in the first degree, a second stage of the trial shall proceed at which the only issue shall be the punishment to be assessed and declared. ... The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor:

(1) If the trier finds by a preponderance of the evidence that the defendant is mentally retarded; or

(2) If the trier does not find beyond a reasonable doubt at least one of the statutory aggravating circumstances set out in subsection 2 of section 565.032; or

(3) If the trier concludes that there is evidence in mitigation of punishment, including but not limited to evidence supporting the statutory mitigating circumstances listed in subsection 3 of section 565.032, which is sufficient to outweigh the evidence in aggravation of punishment found by the trier; or

(4) If the trier decides under all of the circumstances not to assess and declare the punishment at death. ...

STATEMENT OF THE CASE

A jury found the petitioner, Scott A. McLaughlin, guilty of murder in the first degree, armed criminal action, and rape (App. 1a, 4a). The Missouri Supreme Court summarized the facts of petitioner's crimes in its opinion (App. 2a-6a).

With regard to the murder conviction, "the jury found in step one of its penalty phase deliberations that the statutory aggravating factor of depravity of mind had been proven beyond a reasonable doubt" (App. 5a). In step two, the "weighing" step, the jurors "were unable to unanimously conclude that the factors in mitigation outweighed those in aggravation" (App. 5a-6a). Thus, the jury did not assess a life sentence at that point, and the jury was then directed "to [unanimously] determine [in the next step] whether, under all the circumstances, death was warranted" (App. 6a). In the final step, "the jury deadlocked" and was "unable to agree unanimously" on the appropriate sentence (App. 1a, 6a).[1]

Accordingly, as required under Missouri law, "the question of punishment [went] to the trial court" (App. 6a). "The trial court considered all of the evidence, including the aggravating factor found by the jury, and sentenced [petitioner] to death" (App. 6a). In reaching its conclusion that death was the appropriate sentence, the trial judge was required by Missouri law to "follow the same procedure the jury follows" (App. 9a). In other words, the trial judge was

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[1] The point at which the jury deadlocked was known in light of the verdict form, which required the jury to indicate through a series of questions how far it had progressed in its penalty-phase deliberations (*see* App. 11a, 45a-46a).

required to find that the state had proven an aggravating circumstance beyond a reasonable doubt, that the evidence in mitigation did not outweigh the evidence in aggravation, and that under all of the circumstances death was the appropriate sentence (App. 9a-10a).

On appeal to the Missouri Supreme Court, petitioner asserted that allowing the trial judge to make factual findings to support a death sentence violated this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), and the Missouri Supreme Court's decision in *State v. Whitfield*, 107 S.W.3d 253 (Mo. banc 2003), a Missouri case that had applied *Ring* (App. 7a). Specifically, petitioner asserted in his brief that "Section 565.030.4's directive that the judge make death-eligibility fact-findings whenever 'required to determine punishment for murder in the first degree,' violates *Ring v. Arizona*, 536 U.S. 584 (2002) and *State v. Whitfield*, 107 S.W.3d 253 (Mo. banc 2003)" (Pet. Brief 50).

The Missouri Supreme Court rejected this claim, finding that petitioner's penalty phase had complied with this Court's decision in *Ring* and its own decision in *Whitfield*. Specifically, because the jury had found the existence of a statutory aggravating circumstance beyond a reasonable doubt (as shown by the verdict form), there was no *Ring* violation (App. 11a).[2] Additionally, because the verdict form also revealed that the jury had not unanimously

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[2] *Ring* held that "a sentencing judge, sitting without a jury, [may not] find an aggravating circumstance necessary for imposition of the death penalty." 536 U.S. at 609. Rather, "the Sixth Amendment requires that [those circumstances] be found by a jury." *Id.*

concluded that the evidence in mitigation outweighed the evidence in aggravation, there was no *Whitfield* violation (App. 11a).[3]

Additionally, although the claim was not raised in his "Point Relied On," as required under Missouri appellate practice, the Missouri court observed that petitioner had raised an additional claim of instructional error in the body of his argument that was related to the weighing step (App. 14a-15a).[4] More specifically, petitioner had also "assert[ed] that the trial court erred in instructing the jury that it was required to *unanimously* agree that the evidence in mitigation outweighed the evidence in aggravation in order to be required to return a life sentence at step two of the [penalty-phase] procedure" (App. 15a). Petitioner argued that rather than *unanimity* of the jurors in the weighing step, § 565.030.4(2), MO. REV. STAT., required only a *majority* of the jurors to conclude that the evidence in mitigation outweighed the evidence in aggravation (App. 15a; *see* Pet. brief

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[3] In *Whitfield*, the Missouri Supreme Court had held that to remain consistent with *Ring*, the jury should be required to determine whether the evidence in mitigation outweighed the evidence in aggravation (i.e., that *Ring* required the weighing step to be completed by a jury). 107 S.W.3d at 258. As will be discussed below, the Missouri Supreme Court has since clarified that under Missouri law, the weighing step of Missouri's penalty-phase proceedings *does not* involve a factual finding that renders the defendant eligible for a death sentence; thus, while the weighing step must still be completed by the jury under Missouri law, the Missouri Supreme Court has held that it is not subject to *Ring*'s requirement that the determination be made beyond a reasonable doubt.

[4] Both of the claims identified by the Missouri Supreme Court were raised in a single claim of error in petitioner's brief (Pet. Brief 50-64).

60-62). But because this claim of error had not been properly raised in petitioner's brief, "The Court review[ed] this point for plain error" under Missouri's plain-error rule (App. 15a).

The court then rejected the claim, concluding that Missouri's statute required unanimity in the weighing step (App. 16a-20a). The court also observed that because the jurors were not required "to be unanimous in their conclusion that a particular mitigating factor is present," there was "no error of constitutional proportions" (App. 15a-16a). The court then finally concluded that there was no plain error in the penalty-phase instructions dealing with the weighing step; the court stated: "For these reasons, this Court reaffirms its holding in *Zink*[5] that under section 565.030.4(2) [the weighing step], the jury must unanimously decide that the mitigating evidence outweighs the aggravating evidence in order to be required to return a life sentence. There was no plain error in submitting this instruction" (App 20a).

Although petitioner raised several other claims of trial-court error, at no point in his brief did petitioner assert either of the two questions that petitioner has presented in his petition to this Court. Specifically, petitioner did not allege that it was error to instruct the jury on the weighing step without also instructing the jury to make its determination "beyond a reasonable doubt" (Pet. i). Petitioner also did not allege that it was error to "requir[e] the defendant to carry the burden of demonstrating to a unanimous jury that mitigating evidence outweighs aggravating evidence" (Pet. i).

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[5] *State v. Zink*, 181 S.W.3d 66 (Mo. banc 2005).

Thus, the Missouri Supreme Court did not analyze or directly answer either of the two questions presented by the petitioner (*see* App. 7a-20a).

Petitioner filed a motion for rehearing, and, for the first time, petitioner asserted that the burden of proof in the weighing step "should be on the state – not on the defendant" (Mot. for Reh'g 8). Citing this Court's decision in *Ring* (along with other decisions, including the Missouri Supreme Court's decision in *Whitfield*), petitioner pointed out that any fact that increases the range of punishment must be submitted to the jury and proved by the state beyond a reasonable doubt (Mot. for Reh'g 8-9). Petitioner argued that "Requiring the defendant to bear the burden of establishing to a unanimous jury that the mitigating circumstances outweigh the aggravating circumstances stands *Ring* on its head" (Mot. for Reh'g 9). The Missouri Supreme Court declined to review these new arguments, and it summarily denied petitioner's motion for rehearing without any modification to its opinion (Pet. 43a-44a).

REASONS FOR DENYING THE PETITION

I. THE MISSOURI SUPREME COURT DID NOT DECIDE THE QUESTIONS PRESENTED IN PETITIONER'S PETITION; THUS, THIS COURT LACKS JURISDICTION TO GRANT A WRIT OF CERTIORARI ON THE QUESTIONS PRESENTED.

Petitioner presents two questions for the Court's review:

> I. Whether the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000), that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum . . . must be submitted to a jury and proved beyond a reasonable doubt," applies to the weighing of aggravating and mitigating evidence at the penalty phase of a capital trial[; and]
>
> II. Whether Missouri law violates the Eighth and Fourteenth Amendments by requiring the defendant to carry the burden of demonstrating to a unanimous jury that mitigating evidence outweighs aggravating evidence

(Pet. i). But because neither of these questions was analyzed and answered by the Missouri Supreme Court in this case, the Missouri court's judgment is not a "final judgment" on these federal questions as required by 28 U.S.C. 1257(a). *See Adams v. Robertson*, 520 U.S. 83, 86 (1997) ("With 'very rare exceptions,' we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that

we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." (internal citation omitted)).

Under § 1257(a), the Court has jurisdiction to review "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, . . . where . . . the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution[.]" In other words, for the Court to have jurisdiction over any given federal question under § 1257(a), the validity of the state statute must have been "drawn in question" on those grounds, and the state court must have issued a final judgment on that issue. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476 (1975) (in determining jurisdiction under 28 U.S.C. 1257(2), the Court observed: "Two questions concerning our jurisdiction must be resolved: (1) whether the constitutional validity of § 26-9901 was 'drawn in question,' with the Georgia Supreme Court upholding its validity, and (2) whether the decision from which this appeal has been taken is a '(f)inal judgment or decree.'").

Here, on appeal to the Missouri Supreme Court, petitioner did not assert that Missouri's weighing-step statute violated the Constitution either because it failed to comply with *Apprendi* and *Ring* or because it improperly placed a burden of proof on the petitioner or otherwise failed to comply with this Court's Eighth Amendment jurisprudence. Instead, petitioner raised two other claims that only indirectly related to Missouri's weighing step, but that did not challenge its constitutionality.

Primarily, petitioner asserted that the portion of § 565.030.4, MO. REV. STAT. (2008), that allowed a trial judge to impose a sentence of death if the jury was ultimately unable to decide upon punishment violated the Sixth Amendment (App. 7a; Pet. brief 50). Specifically, petitioner asserted that "Section 565.030.4's directive that the judge make death-eligibility fact-findings whenever 'required to determine punishment for murder in the first degree,' violates *Ring v. Arizona*, 536 U.S. 584 (2002) and *State v. Whitfield*, 107 S.W.3d 253 (Mo. banc 2003)" (Pet. Brief 50).

In rejecting petitioner's claim, the Missouri court cited *Ring* and discussed its previous holding in *State v. Whitfield* (a Missouri case that had applied *Ring* to Missouri's capital sentencing procedures) (App. 7a-12a). The court then held:

> As the above discussion notes, *Whitfield* does not state that a judge cannot enter a death sentence if the jury deadlocks; it says, rather, that under the principles set out in *Ring*, the jury must make the required factual findings that increase the punishment from a life sentence to death. *Whitfield*, 107 S.W.3d at 261-62

(App. 11a). The court then observed that the jury *had* made all of the required factual findings (as demonstrated by the verdict form that the jury was required to fill out in the event of a deadlock); the court stated:

> The jury in this case followed its instructions and answered that it did find the statutory aggravator that the crime was committed with depravity of mind in that [petitioner]

> committed repeated and excessive acts of physical abuse. It also specifically found that it could not unanimously conclude that the evidence in mitigation outweighed the evidence in aggravation of punishment. Its answers thus show that it became deadlocked only after making the necessary factual findings. *Whitfield* did not hold that a judge could not consider the facts and make a determination whether to impose death once a jury had found the facts necessary to make a defendant eligible for a death sentence under section 565.030.4, and such a procedure does not violate *Ring*.

(App. 11a).

As is evident, in deciding the question presented to it, the Missouri Supreme Court did not analyze or answer the question of whether Missouri's weighing step comports with *Apprendi* and *Ring*. Rather, the court only concluded that once the jury had made the factual findings required by its own decision in *Whitfield*, it did not violate *Ring* to allow the trial judge to make its own factual findings and impose a sentence of death. Thus, Missouri's statute was not "drawn in question" on the grounds now asserted in the petition, and the Missouri Supreme Court did not issue a final judgment on those federal questions.

In attempting to suggest that the Missouri court answered the questions presented, petitioner cites to the Missouri court's statement that "this Court reaffirms its holding in *Zink* that under section 565.030.4(2) [the weighing step], the jury must unanimously decide that the mitigating evidence outweighs the aggravating evidence in order to be

required to return a life sentence" (Pet. 5, 13; *see* App. 20a).[6] But in stating this holding, the court was not answering the question of whether Missouri's weighing step should require a determination beyond a reasonable doubt, or whether it was proper in the weighing step to place a burden of proof on the defendant. Rather, the court was analyzing petitioner's subsidiary plain-error claim that Missouri's penalty-phase instructions did not comport with § 565.030.4(2), MO. REV. STAT. (*see* App. 14a-15a).

In his brief, petitioner had alleged instructional error *not* because the penalty-phase instructions were unconstitutional for either of the reasons now raised in petitioner's petition, but because the instructions failed to properly instruct the jury on Missouri law. Specifically, petitioner argued that the jury should not have been instructed that it had "to *unanimously* agree that the evidence in mitigation outweighed the evidence in aggravation," but, rather, that, under § 565.030.4(2), it should have been instructed that only a *majority* of the jurors had to agree that the evidence in mitigation outweighed the evidence in aggravation (App. 15a). In short, it was petitioner's contention that under § 565.030.4(2), the weighing step required only a majority of the jurors to conclude that the evidence in mitigation outweighed the evidence in aggravation, and, thus, the jury had not been properly instructed (App. 15a; *see* Pet. brief 60-62). Thus, again, Missouri's statute was not "drawn in question" on the federal grounds now asserted in the petition, and the Missouri Supreme

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[6] Although he twice cites to this language (Pet. 5, 13), petitioner neglects to mention that the Missouri Supreme Court was analyzing an improperly preserved claim of instructional error under Missouri's plain-error rule (14a-15a).

Court did not issue a final judgment on these federal questions.

In sum, the Missouri Supreme Court did not finally determine the federal questions presented in the petition, and the holding that petitioner relies on from the Missouri court's opinion comes from the court's analysis of an instructional error that was not properly presented to the court. Accordingly, the Court lacks jurisdiction under § 1257(a) to consider petitioner's federal questions, and the Court should decline to grant a writ of certiorari to the Missouri Supreme Court. *Adams v. Robertson*, 520 U.S. at 86.

II. EVEN IF THE QUESTIONS PRESENTED WERE TANGENTIALLY IMPLICATED BY THE MISSOURI COURT'S OPINION, THE MISSOURI COURT DID NOT DECIDE A FEDERAL QUESTION IN A MANNER THAT CONFLICTS WITH THIS COURT'S SIXTH OR EIGHTH AMENDMENT CASES.

Because the Missouri Supreme Court held that it did not violate *Ring* for the trial judge to determine that death was an appropriate sentence, and because the court noted that the trial judge (in addition to the jury) was guided by Missouri law in making its determination of an appropriate sentence, it could be argued that the Missouri Supreme Court implicitly held that there was no Sixth or Eighth Amendment violation in Missouri's weighing step. Again, the Missouri Supreme Court was not asked to consider whether the weighing step violated the Constitution, but even if the Court determines that the questions presented are tangentially implicated, further review of the Missouri court's opinion is not warranted.

A. The Court's decisions in *Apprendi* and *Ring* do not require the trier of fact, in conducting Missouri's weighing step, to make its determination beyond a reasonable doubt.

In *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000), the Court affirmed that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be . . . submitted to a jury, and proven beyond a reasonable doubt." The Court subsequently applied this rule in *Ring v. Arizona*, 536 U.S. 584, 609 (2002), to hold that "a sentencing judge, sitting without a jury," could not "find an aggravating circumstance necessary for imposition of the death penalty." Rather, because aggravating circumstances increase the range of punishment (to include the death sentence), "the Sixth Amendment requires that they be found by a jury" beyond a reasonable doubt. *Id.*

Shortly after *Ring* was decided, the Missouri Supreme Court decided *State v. Whitfield*, 107 S.W.3d 253 (Mo. banc 2003), a case in which the jury deadlocked and the trial judge made the requisite statutory findings and imposed a sentence of death. On appeal, the Missouri Supreme Court applied *Ring* to Missouri's penalty-phase procedures and concluded that statutory aggravators had to be submitted to the jury and found beyond a reasonable doubt. *Id.* at 258-259. The court then analyzed whether the remaining three steps under the then-current version of § 565.030.4 were subject to *Ring*'s requirements. With regard to the weighing step, the court concluded that the jury's determination of "whether the evidence in mitigation outweighs the evidence in aggravation" was a factual finding that made the

defendant death eligible. *Id.* at 259-261. Thus, the court concluded that the weighing step was not a step that could be conducted by a judge sitting without a jury, and, accordingly, the court concluded that the judge had violated *Ring* when the judge made that factual finding. *Id.* at 261-262.

Citing *Whitfield*, petitioner argues that, although "the Missouri Supreme Court [in *Whitfield*] ostensibly found the *Apprendi* rule applicable to the weighing determination, in petitioner's case t[he Missouri Supreme] court held that the defendant – rather than the state – must bear the burden of persuading a unanimous jury that the mitigating evidence outweighs aggravating evidence" (Pet. 5). Petitioner thus argues that "Missouri applies the jury submission portion of the *Apprendi* rule, but eschews the inseparable requirement that it is the state that must prove against the defendant, beyond a reasonable doubt, the existence of any fact that raises the punishment ceiling" (Pet. 5).

But petitioner's reliance on the Missouri court's decision in *Whitfield* is misplaced. The opinion in *Whitfield* represents the Missouri Supreme Court's first application of *Ring* to Missouri's capital penalty-phase procedures. But while the court indicated in *Whitfield* that the weighing step constituted a factual determination that made the defendant "death eligible," the Missouri Supreme Court has since recognized that, under Missouri law, the weighing step is *not* a factual determination that must be proved beyond a reasonable doubt (because it is not a factual finding that actually increases the range of punishment). In fact, very recently, in *Zink v. State*, --- S.W.3d ---, 2009 WL 454283 (Mo. banc 2009), the Court rejected a claim that Missouri's weighing-step

determination had to be made beyond a reasonable doubt. The Court cited the rule from *Apprendi* and *Ring* and expressly stated that Missouri's weighing step did not "require[] a finding of a fact that may increase Mr. Zink's penalty." *Id.* at *19. The court explained:

> [The weighing step does not] require[] a finding of a fact that may increase Mr. Zink's penalty. Instead, the jury is weighing evidence and all information before them. Only findings of fact that increase the penalty for a crime beyond the prescribed statutory maximum are required to be found by a jury beyond a reasonable doubt. This Court previously has recognized this distinction and held that steps two and three [step three was the weighing step at Mr. Zink's trial] do not need to be found by a jury beyond a reasonable doubt. *See State v. Glass*, 136 S.W.3d 496, 520-21 (Mo. banc 2004); *State v. Gill*, 167 S.W.3d 184, 193 (Mo. banc 2005).

Id. Thus, contrary to petitioner's argument, under Missouri law, Missouri's weighing step is *not* a determination that must be made beyond a reasonable doubt, as it is *not* a factual finding that increases the maximum punishment.[7] *See State v. Gill*, 167 S.W.3d 184, 193 (Mo. banc 2005) ("Although section 565.030.4 expressly requires the jury to use the reasonable doubt standard for the determination of whether any statutory aggravators exist, the statute does not impose the same requirement on the

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[7] The *amici* in support of the petition also incorrectly view Missouri's weighing step as a "culpability determination" that "expose[s] a defendant to a death sentence" (Am. Br. 13).

determination of whether evidence in mitigation outweighs evidence in aggravation.").

And, in fact, the plain language of Missouri's capital-sentencing statute does not premise an increase in a capital defendant's sentence upon any finding made during the weighing step. To the contrary, the statute provides, in relevant part, that "If the trier concludes that there is evidence in mitigation of punishment . . . which is sufficient to outweigh the evidence in aggravation of punishment," the trier of fact "shall assess and declare punishment at life imprisonment." § 565.030.4, Mo. Rev. Stat. (2008). In other words, the weighing step involves a factual determination that *limits* the range of punishment to life imprisonment.[8]

In short, the only authority for petitioner's claim that "the *Apprendi* rule applies to the weighing step of Missouri's capital sentencing scheme" (Pet. 15), is some outdated language from the Missouri Supreme Court's decision in *Whitfield*.[9] But, as discussed

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[8] In light of this statutory language, by arguing that Missouri's weighing step should be subject to a beyond-a-reasonable-doubt standard of proof, petitioner and the *amici* in support of the petition are essentially arguing either that a defendant in Missouri should be required to prove beyond a reasonable doubt that he is entitled to a life sentence due to the strength of the mitigating evidence, or (more likely) that this Court should rewrite Missouri's weighing-step statute and require finders of fact in Missouri to determine beyond a reasonable doubt that the evidence in aggravation outweighs the evidence in mitigation. The Court should decline to adopt either alternative.

[9] Petitioner's misplaced reliance on *Whitfield* pervades the petition; thus, petitioner argues, for example: "Assignment of the burden of persuasion to the defense at a death-eligibility

above, petitioner's argument is based on an incorrect understanding of Missouri law, as the Missouri Supreme Court has since recognized that while the weighing step must be submitted to the jury under Missouri law, Missouri law does not premise an increase of punishment upon the determination made in the weighing step. *Zink v. State*, 2000 WL 454283 at *19. Accordingly, inasmuch as Missouri's weighing step does not involve a factual determination that increases the range of punishment for a capital defendant, the rule of *Apprendi* and *Ring* does not apply, and the Sixth Amendment does not require the trier of fact to make the weighing-step determination beyond a reasonable doubt.

B. Because Missouri's weighing step is not a factual finding that increases the range of punishment (as contemplated by *Apprendi* and *Ring*), it does not violate the Constitution to place on the defendant "the burden of proving mitigating circumstances sufficiently substantial to call for leniency."

Petitioner also argues extensively that Missouri's weighing step violates the Constitution by putting

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stage conflicts with this Court's Sixth, Eighth, and Fourteenth Amendment jurisprudence" (Pet. 5-6); "If even a single juror finds the mitigating evidence insufficient, the defendant becomes death-eligible" (Pet. 7); "By finding that the *Apprendi* rule applies to the weighing step of Missouri's capital sentencing scheme, but nonetheless holding that it is the defendant who (at this step) must persuade the jury that he is not death-eligible, the Missouri Supreme Court seriously clouds the bright-line *Apprendi* rule" (Pet. 15); and "The Missouri Supreme Court's holding that, though the *Apprendi* rule applies, the state sentencing scheme properly places the burden of persuasion on the defendant at the weighing stage cannot be reconciled with this Court's *Apprendi* decision" (Pet. 23).

the burden of proof on the defendant and requiring the defendant to convince all of the jurors that the evidence in mitigation outweighs the evidence in aggravation (*see* Pet. 5-7, 15, 23). Petitioner argues that it is improper to burden the defendant in the weighing step because the weighing step requires the jury to make a factual finding that renders the defendant eligible to receive a death sentence (Pet. 5-7, 15, 23). But, again, this argument is premised upon petitioner's misplaced reliance on the Missouri Supreme Court's opinion in *Whitfield*. As discussed above, in the several years since *Whitfield* was decided, the Missouri Supreme Court has repeatedly clarified that, under Missouri law, Missouri's weighing step does not include a factual finding that increases the range of punishment.

In other words, it is apparent that Missouri's weighing step does not set forth an "element" (or fact increasing punishment) of murder in the first degree; rather, it is merely an instruction that gives the jury guidance on how to consider the mitigating evidence that has been presented to it. That is, the weighing step merely instructs the jurors that if they all agree that there is evidence in mitigation that outweighs the evidence in aggravation, the jury *must* impose a life sentence (*see* Pet. 47a). To the extent that this places a burden on the defendant to convince all of the jurors that the evidence in mitigation outweighs the evidence in aggravation, allocating the burden in that fashion in the weighing step does not violate any provision of the Constitution. As the Court held in *Walton v. Arizona*, 497 U.S. 639, 650 (1999), "So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances,

a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency."[10]

In *Kansas v. Marsh*, 548 U.S. 163 (2006), the Court recently affirmed the ongoing validity of this principle from *Walton*. In *Marsh*, the Court examined a Kansas statute that directed the jury to sentence a defendant to death if it found that the evidence in aggravation was not outweighed by the evidence in mitigation. *Id.* at 166. The defendant in *Marsh* argued that the statute "establishe[d] an unconstitutional presumption in favor of death because it directs imposition of the death penalty when aggravating and mitigating circumstances are in equipoise." *Id.* at 166-167. But the Court rejected the defendant's challenge, holding that the case was controlled by the decision in *Walton*.

The Court reiterated that "a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." *Id.* at 170-171. The Court observed that "a jury must have the opportunity to consider all evidence relevant to mitigation, and that a state statute that permits a jury to consider any mitigating evidence comports with that requirement." *Id.* at 171. And, significantly, the Court stated "that while the Constitution requires that a sentencing jury have discretion, it does not mandate that discretion be

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[10] In *Ring*, the Court partly overruled *Walton*. 536 U.S. at 609 ("we overrule *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty").

unfettered; the States are free to determine the manner in which a jury may consider mitigating evidence." *Id.* Accordingly, even though the Kansas statute *required* the jury to impose a sentence of death if it unanimously found that the evidence in aggravation was not outweighed by the evidence in mitigation, the Court concluded that it comported with the requirements of the Constitution. *Id.* at 173.

The Court explained further that even if *Walton* did not expressly answer the question, the Court's various prior precedents dictated the same outcome. The Court pointed out that, with regard to mitigation evidence, the Court's jurisprudence was quite limited. As the Court stated, "In aggregate, our precedents confer upon defendants the right to present sentencers with information relevant to the sentencing decision and oblige sentencers to consider that information in determining the appropriate sentence." *Id.* at 175. The Court then observed that it had "never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required." *Id.* "Rather, this Court has held that the States enjoy '"a constitutionally permissible range of discretion in imposing the death penalty."'" *Id.* And, under those general principles – in addition to the holding in *Walton* – the Court concluded that the Kansas death-penalty statute satisfied the Constitution.

Likewise, in petitioner's case, Missouri's statute, including its weighing step, comports with these requirements. Under Missouri's capital sentencing scheme, a defendant is allowed to present any evidence in mitigation; the jurors are not required to unanimously find or agree upon any particular mitigating fact; and the jurors are both directed and

allowed to impose a life sentence if they find that the mitigating evidence outweighs the aggravating evidence, or if they simply conclude under all of the circumstances not to impose a sentence of death.

In light of these provisions, Missouri's weighing step does not have "grave practical implications for capital defendants" (Pet. 15). For, while it is true that "A lone juror" (Pet. 15) in the weighing step can deem the mitigating evidence insufficient to *automatically* warrant a life sentence, this determination by a hypothetical lone juror does not "render[] the defendant death eligible" (because this is not the finding that increases the range of punishment), and it will not result in the automatic imposition of a death sentence in any case (as the jury is instructed thereafter on an additional step that requires consideration of all the evidence).

As the Missouri Supreme Court has recognized, Missouri's weighing step does not increase the range of punishment; thus, notwithstanding any "death-eligibility" language by the Missouri Supreme Court in *Whitfield* (or other cases), Missouri's weighing step does not result in a factual finding that increases the punishment or makes the defendant "eligible" for death (as that term has meaning under *Apprendi* and *Ring*).[11] *See Zink v. State*, 2009 WL

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[11] Although the Missouri Supreme Court has continued to refer to the weighing step as an "eligibility" step, *See Zink v. State*, 2009 WL 454283 at *18, it is apparent in light of its recent opinions that the court is not thereby suggesting that the weighing step increases the range of punishment. *See id.* at *19. The use of such language should be understood to refer to the fact that, in the weighing step, a defendant who is already eligible for a death sentence (due to the prior finding of a

454283 at *19. To the contrary, inasmuch as the weighing step takes place *after* the jury has unanimously found an aggravating circumstance beyond a reasonable doubt (and thereby rendered the defendant eligible to receive a sentence of death), it is evident that the weighing step merely provides the jury with an opportunity to automatically *remove* the defendant from the pool of death-eligible offenders (due to the strength of the mitigating evidence). This is proper guidance with regard to the consideration of mitigating evidence, and it does not violate the Constitution to place a burden on the defendant to prove the strength of the mitigating evidence.

In sum, because it is permissible under *Walton* to place a burden on the defendant to prove "mitigating circumstances sufficiently substantial to call for leniency," and because Missouri's weighing step merely informs that it must impose a life sentence if it unanimously determines that the mitigating evidence outweighs the aggravating evidence, Missouri's weighing step does not run afoul of the Constitution. To the contrary, as the Court stated in *Walton* and *Marsh*, (in analyzing the respective death-penalty statutes of Arizona and Kansas), Missouri's weighing step "merely channels a jury's discretion by providing it with criteria by which it may determine whether a sentence of life or death is appropriate" and "provides the type of ' "guided discretion,' " that the Court has previously sanctioned. *See Kansas v. Marsh*, 548 U.S. at 177; *Walton v. Arizona*, 497 U.S. at 659. There is no need to depart from these principles.

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statutory aggravator) will either become ineligible for a death sentence or *remain* eligible for a death sentence.

C. This Court's precedents provide adequate guidance to lower courts, and the purported "confusion" and "tension" the petitioner cites to in his petition is simply the natural consequence of this Court's precedents, which have held that "the States are free to determine the manner in which a jury may consider mitigating evidence."

In urging the Court to review his case, petitioner asserts that "the state and federal courts are irreconcilably conflicted" on the question of whether *Apprendi* and *Ring* apply to the weighing of mitigating and aggravating evidence (Pet. 17). He then asserts, again based on the Missouri Supreme Court's decision in *Whitfield*, that Missouri is among a small minority of courts that have held that *Apprendi* and *Ring* are "applicable to the weighing of aggravating and mitigating evidence" (Pet. 17-18).

But inasmuch as the Missouri Supreme Court has clarified in the several years since *Whitfield* that Missouri's weighing step *does not* increase the range of punishment, Missouri is among those courts that have determined, in one fashion or another, that *Apprendi* is not applicable to the weighing step (*see* Pet. 20-23). By petitioner's count, once Missouri is added to the list, six state courts of last resort and four federal circuit courts have held that *Apprendi* does not apply because the weighing step is not a factual determination, and another six state courts of last resort (including Missouri) have held that *Ring* is not applicable because the weighing step does not increase the range of punishment (Pet. 20-23).

Of those courts that have held that *Apprendi* and *Ring* do apply to the weighing step, seven are in states that have enacted legislation stating that the weighing step is a step that increases the range of punishment or requires proof beyond a reasonable doubt (Pet. 19). The other five state courts of last resort listed by petitioner (not including Missouri) have judicially determined that their states' weighing steps increase the range of punishment (or render the defendant eligible for a sentence of death) and, thus, involve factual findings that must be proved beyond a reasonable doubt (Pet. 17-19).

But what these different approaches show is not "confusion" or "tension" (Pet. 15-16); rather, what these different approaches show is that the Court's precedents have provided adequate guidance to lower courts on this question, but that different statutes require different procedures in the penalty phase. If, for example, a state's penalty-phase statute indicates that the weighing step increases the range of punishment (e.g., if the statute requires the state to prove that the aggravating circumstances must outweigh the mitigating circumstances *before* a sentence of death may be imposed), a state court might be expected to hold that the weighing step must be submitted to the jury and proved beyond a reasonable doubt in accordance with *Apprendi* and *Ring*. On the other hand, if, as in Missouri's statute, it is apparent that the weighing step is designed to identify a set of circumstances that warrant the automatic imposition of a life sentence, this factual determination does not increase the range of punishment, and, accordingly, this type of weighing need not be determined beyond a reasonable doubt.

To be sure, this will result in different methods of instructing the jury. But as the Court stated in *Marsh*, the Court has "never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required." *Id.* "Rather, this Court has held that the States enjoy ' "a constitutionally permissible range of discretion in imposing the death penalty." ' " *Id.* Accordingly, "So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, . . . a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." *Walton v. Arizona*, 497 U.S. at 650.

In short, these principles adequately protect the guarantees of the Sixth and Eighth Amendments in capital trials, and Missouri's capital sentencing scheme does not run afoul of any of them.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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